IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In re Corrugated Container Antitrust Litigation
M.D.L. 310

ADAMS EXTRACT COMPANY, ET AL.,

Petitioners,

v.

CHARLES J. FRANEY AND ALEX HOPKINS,

Respondents.

BRIEF OF RESPONDENT, CHARLES J. FRANEY, IN OPPOSITION TO PETITION FOR CERTIORARI

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SUMMARY OF ARGUMENT

The judgment of the Court of Appeals for the Fifth Circuit does not, in affording to Respondent, Charles J. Franey, his Fifth Amendment protection, conflict with that of the Eighth Circuit Court of Appeals. The judgment re-affirms settled law limiting the source of immunity grants to the Executive Branch and the role of the Judicial Branch in applying immunity statutes. There are no Rule 17 "special or important" reasons for granting a writ of certiorari.

ARGUMENT

Deep concern has been expressed over the possible abuse of the immunity process in private litigation. The Court in *United States* v. *Dunham Concrete Products, Inc.*, 475 F.2d 1241 (5th Cir.) *cert. denied*, 414 U.S. 832 (1973) stated at 1245-46:

> A zealous antitrust plaintiff could easily immunize an entire industry from criminal prosecution under the antitrust laws.

The Court there pointed out that a decision to prosecute criminal violations could, thus, become a decision, not of responsible government officials, but of private antitrust plaintiffs.

The District Court in *In re Folding Carton Antitrust Litigation*, 465 F.Supp. 618 (N.D. Ill.) *rev'd on other grounds*, 609 F.2d 867 (7th Cir. 1979) refused to broaden through private litigation the scope of 18 U.S.C. Sec. 6001 *et seq* immunity granted in a grand jury proceeding, to encompass testimony in a subsequent civil deposition, and stated at 629:

> Such an expansion of the witnesses' immunity would come at the plaintiffs' request, not the government's. Plaintiffs would essentially be in the position of granting immunity which is a result inconsistent with Congress' antitrust policy (citations omitted) and with congressional policy limiting the power to authorize grants of immunity to the Executive Branch. (citations omitted) Under circumstances where the witnesses have "a reasonable fear of prosecution" compelling the deposition testimony of these five witnesses would essentially constitute an impermissible transformation of the limited "use" immunity grant envisioned under Sec. 6002 into a "transactional" immunity grant.

In this private litigation, however, the antitrust plaintiffs succeeded in persuading the trial court to grant additional, purported immunity at plaintiffs' request. This, notwithstanding the role of the federal court in the immunity process has been clearly defined. The Seventh Circuit in *In re Daley* 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977) stated at 479 (citations omitted):

> The role of the Federal Court is restricted to a ministerial function. The Court may scrutinize the record to ascertain that a request for immunity is, under the statute, jurisdictionally and procedurally well founded, and accompanied by the approval of the Attorney General. Under no circumstances, however, may a Federal Court prescribe immunity on its own initiative, or determine whether application for an immunity order which is both jurisdictionally and procedurally well founded, is necessary, advisable or reflective of the public interest, for the federal judiciary may not arrogate a prerogative specifically withheld by Congress.

This limited role of the Judicial Branch has been indicated by this Court in *Ullman* v. *United States,* 350 U.S. 422, 76 S. Ct. 497, 100 L. ED. 511 (1956) rejecting the contention that the federal immunity statute unconstitutionally required a district court to act outside its "judicial power":

> Since the Court's duty under the (predecessor of the present immunity statute) is *only* to ascertain whether the statutory requirements are complied with by the grand jury, the United States Attorney and the Attorney General, we have no difficulty in concluding that the district court is confined within the scope of "judicial power."

But, here the trial court attempted to broaden and extend Section 6001 *et seq* immunity from testimony given in a criminal proceeding to testimony given in a civil and private one. This, without consultation with, intervention by, or approval of the Executive Branch.

Petitioners do not argue that Section 6001, *et seq* immunity confers "transactional" immunity. It clearly does not. Nor do Petitioners deny the risk to Respondent, Franey, notwithstanding Sec. 6001, *et seq* immunity, of future prosecution based upon any self-incriminating information "derived from a legitimate source wholly independent of the compelled testimony". This Court has confirmed such risk in *Kastigar* v. *United States,* 406 U.S. 441 (1972).

This Respondent, then, is exposed to future prosecution for any illegal activities revealed in a civil deposition which the district court ordered given. In *United States* v. *Kuehn,* 562 F.2d 427, 432 (7th Cir. 1977), the Court held that a grand jury witness who repeated, without a separate grant of immunity, his immunized grand jury testimony in subsequent criminal trials and to a newspaper reporter created independent sources of evidence which could be used against him in a subsequent state prosecution. And in *United States* v. *Seiffert,* 501 F.2d 974 (5th Cir. 1974) the Court held that a civil deposition, in which a witness repeats testimony immunized in a prior proceeding, constitutes an independent source of evidence that can be used against the witness in subsequent criminal prosecutions.

Under *Kastigar* criminal prosecution based on a "wholly independent source" is approved. There, it is demonstrated that Sec. 6001, *et seq* immunity affords no protection for any self-incriminating information disclosed by the witness on any other occasion before or after trial testimony. Respondent, Franey's, deposition could provide such a "wholly independent source" from his Sec. 6001 *et seq* immunized testimony. A new, unprotected source of evidence would be created, exposing Respondent, Franey, to future prosecution.

But, Petitioners contend, under Sec. 6001, *et seq*, immunity any answers Respondent, Franey, may give to questions related to antitrust violations which are asked in a subsequent, civil deposition are sterilized. They are "tainted" by such grant of immunity; protected by it, Petitioners argue, because the answers to such questions are "directly or indirectly derived", within the meaning of 18 U.S.C. Sec. 6001-6003 from Respondent, Franey's, prior immunized criminal trial testimony.

Petitioners insist the District Court can determine now — at the time the civil deposition questions are asked — the nature of Respondent, Franey's, answers. This, because the prior immunized, criminal trial testimony has been transcribed and

made available for study to plaintiffs and the trial court; and the civil deposition questions asked will either be taken verbatim from such transcripts or are so closely related in "subject matter" as to be questions "directly or indirectly derived" therefrom. Therefore, the trial court may determine *prospectively* that Respondent, Franey's, answers to civil deposition questions, although not necessarily the same questions as those propounded during Respondent, Franey's, criminal trial testimony, will elicit substantially the same answers related to the same subject matter. Thus, say Petitioners, such answers will be so "directly or indirectly derived" from Respondent, Franey's immunized, criminal trial testimony as to be protected by 18 U.S.C. Sec. 6001-6003.

The Court in *In re Folding Carton Antitrust Litigation*, 465 F.Supp. 618 (N.D. Ill.), *rev'd. on other grounds*, 609 F.2d 867 (7th Cir., 1979) warned against such prospective determination by a trial court at 629:

> [W]e could not prevent the civil depositions from covering topics and incidents far beyond the scope of grand jury testimony [immunized under 18 U.S.C. Sec. 6001 *et seq*]. Even assuming that we ordered a release of the prior immunized testimony and confined plaintiffs to asking questions which were actually asked under the grand jury immunity grant, we could not prevent the deponent from testifying at greater length and detail about potentially incriminating transactions.

Accepting, *arguendo*, that any testimony may be compelled in this situation, here the trial court's "guidelines" contained in its pretrial orders are simply of no guidance. The distinction between testimony which may be compelled, because protected, and testimony which may not be compelled, because not "closely related in subject matter", as designated by the trial court, clarifies little. Answers at civil deposition to questions not propounded during the immunized, criminal trial testimony; a further explanation; refreshed recollection; even answers which may be inadvertently inconsistent with earlier answers, may strip

the witness of his constitutional protection. In the circumstances of this case, wherein the grand jury investigation and criminal trial are not coextensive with plaintiffs' action in terms of violations alleged, parties involved, geographic scope or even time period, it simply is not true that all deposition questions are or can be "derived" from the immunized, criminal trial testimony of a witness.

PETITIONERS' AUTHORITIES DISTINGUISHED

Respondent submits that the Eighth Circuit authorities, *Appeal of Starkey*, 600 F.2d 1043 (8th Cir. 1979) and *Little Rock School District* v. *Borden, Inc.*, 1980-2 Trade Cases Par. 63,522 at p. 76,783 (8th Cir. 1980) are not in conflict with the Fifth Circuit's holding here. As pointed out in footnote No. 5 of its opinion in 620 F.2d 1086 the Fifth Circuit stated at 1092:

> Nevertheless, the result in *Starkey* may well be correct since the state attorney general, the only potential prosecutor, was a party to the civil litigation and was the party seeking the deposition testimony. By arguing that the testimony would be tainted the Attorney General conceded that the testimony would be inadmissible in a future prosecution. This concession may itself have operated as a grant of immunity.

In the analogous *Borden* case the same principle applies. In *Starkey* and *Borden* the Eighth Circuit did not have to speculate as to the prosecutor's ability to circumvent its rulings as to the future admissability of the compelled testimony in a criminal prosecution. The prosecuting government conceded its inadmissability and was bound by its stated position thereafter. Furthermore, the *Starkey* and *Borden* court emphasized that the deposition testimony would only be immunized to the extent that it was within the guidelines set out by the court, and stated in *Starkey* at 1048:

> We note that in testifying at the deposition, appellant is required to answer only questions which are within the

same time, geographical and substantive framework as the grand jury testimony.

No such judicial guidelines or limitations exist here. The trial court ruled by pretrial order that all deposition testimony "related in subject matter" would be tainted by prior grants of immunity. No definitive guidelines for the use of Respondent's transcripts in the deposition were thereby provided.

Petitioners do not deny that Respondent's answers to the proposed questions may tend to incriminate. Nor do they deny that a risk of prosecution exists. Respondent submits these are the issues for the trial court's determination, since Respondent had not been granted immunity to compel his civil deposition testimony. There, the role of the trial court should have ended. In proceeding further, however, the trial court would strip Respondent of his Fifth Amendment protection. Surely, this constitutional bulwark cannot be dissipated, and its purpose jeapordized, through the vehicle of a private, civil lawsuit in which plaintiffs seek their own financial gain.

CONCLUSION

Respondent respectfully submits that Petitioners have failed to sustain their burden under Rule 17. The Court of Appeals correctly held that the trial court was in error in adjudging Respondent in contempt and properly vacated such order.

Respectfully submitted,

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